Supreme Ct.
FILED
JAN 30 2003
OFFICE OF THE CLERK

No. 02-997

In The
Supreme Court of the United States

NANCY MONTALVO, BRIAN VILA
AND EMANUEL L. VILA, et al.,

Petitioners,

v.

TERRE BORKOVEC, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether parents have the right, prior to the birth of their viable baby, to request that their baby not be resuscitated and evaluated for ongoing treatment, simply because the baby is at risk for developing a disability at some time in the future?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The parties to this matter include the following petitioners:

1. Nancy Montalvo;
2. Brian Vila;
3. Emanuel L. Vila, by his Guardian ad Litem, Timothy J. Aiken;
4. Blue Cross Blue Shield United of Wisconsin;
5. Wisconsin Division of Health Care Finance; and,
6. PrimeCare Health Plan.

The individual respondent named in the caption of this matter, Terre Borkovec, M.D., is the obstetrician who performed the cesarean section at issue, and delivered Emanuel Vila. Petitioners voluntarily dismissed their claims against her on December 5, 2000. The remaining respondents in this lawsuit are:

1. Brent W. Arnold, M.D.;
2. Jonathan H. Berkoff, M.D.;
3. St. Mary's Hospital of Milwaukee;

   Parent corporation: Columbia St. Mary's, Inc. There is no publicly held company that holds 10% or more of the stock.

4. Wisconsin Patients Compensation Fund;

   There is no parent corporation or company that holds 10% or more of the stock of Wisconsin Patients Compensation Fund; and,

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT – Continued

5. Physicians Insurance Co. of Wisconsin.

There is no parent corporation or publicly held company that holds 10% or more of the stock of Physicians Insurance Co. of Wisconsin.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT ON JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER REGULATIONS INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	5
REASONS FOR DENYING THE PETITION	7
I. NO FEDERAL CLAIM WAS PRESENTED TO THE WISCONSIN COURTS	8
II. THE STATE COURT DECISION RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS	10
III. THE DECISION OF THE WISCONSIN COURT IS IN ACCORD WITH EVERY DECISION OF EVERY COURT TO RULE ON THE ISSUE	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 8, 9

Bailey v. Anderson, 326 U.S. 203 (1945) 8

Berman v. Allen, 404 A.2d 8 (1979) 13

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 8

Cardinale v. Louisiana, 394 U.S. 437 (1969) 8

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) 7

Fuller v. Oregon, 417 U.S. 40 (1974) 8

HCA, Inc. v. Miller, 36 S.W.3d 187 (Tex. Ct. App. 2000) 14, 15

Heath v. Alabama, 474 U.S. 82 (1985) 8

Herb v. Pitcairn, 324 U.S. 117 (1945) 1, 11

Hill v. California, 401 U.S. 797 (1971) 8

Iafelice v. Zarafu, 534 A.2d 417 (N.J. App. Div. 1987) 12, 13, 14

In re Edna M.F., 210 Wis. 2d 557, 563 N.W.2d 485 (1997) 7, 10, 15

L.W. v. L.E. Phillips Career Dev. Ctr., 167 Wis. 2d 53, 482 N.W.2d 60 (1992) 11

Michigan v. Long, 63 U.S. 1032 (1983) 11

McGoldrick v. Compagnie Genrale Transatlantique, 309 U.S. 430 (1940) 8

Moore v. Illinois, 408 U.S. 786 (1972) 8

TABLE OF AUTHORITIES – Continued

Page

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 1

Oxley Stave Co. v. Butler Country, 166 U.S. 648 (1897) 1

Ridgway v. Ridgway, 454 U.S. 46 (1981) 11

Stanley v. Illinois, 405 U.S. 645 (1972) 8

Street v. New York, 392 U.S. 576 (1969) 8

Tacon v. Arizona, 410 U.S. 351 (1973) 8

Webb v. Webb, 451 U.S. 493 (1981) 9

STATUTES AND REGULATIONS

28 U.S.C. § 1257 ..... 1, 2, 8

45 C.F.R. § 1340.15(a)-(b) 2

Wis. Stats. § 448.30 (2001) 4

Wis. Stats. § 802.06(2)(a)6 (2000) 1, 5

OPINIONS BELOW

The Circuit Court for Milwaukee County, the Honorable Mel Flanagan presiding, granted Respondents' Motion to Dismiss for failure to state a claim, pursuant to Wis. Stats. § 802.06(2)(a)6 (2000), at a hearing on April 30, 2001. The Wisconsin Court of Appeals, District I, affirmed that decision on May 29, 2002. The Supreme Court of Wisconsin denied Petitioners' Petition for Review on September 26, 2002.

STATEMENT ON JURISDICTION

This Court is without jurisdiction pursuant to 28 U.S.C. § 1257 because Petitioners' federal claims were not properly presented to the Wisconsin State Courts below. The first time a federal claim was presented was in the Petition for Writ of Certiorari to this Court. The jurisdiction of this Court to re-examine the final judgment of a state court can only arise if the record as a whole shows, either expressly or by clear implication, the federal claim was adequately presented in the state system. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler Country*, 166 U.S. 648, 655 (1897). Because the record in this case does not so show, this Court is without jurisdiction. Moreover, there were independent and adequate state grounds for the Wisconsin Courts' decisions regarding this matter, thus providing further reasoning for this Court's lack of jurisdiction. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER REGULATIONS INVOLVED IN THE CASE

28 U.S.C. § 1257 State courts; certiorari

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

Child Abuse Prevention and Treatment Act (CAPTA) of 1984, Pub. L. No. 98-457, 98 Stat. 1749 (codified at 42 USC § 5101 et. seq.)

45 C.F.R. § 1340.15(a)-(b) Services and treatment for disabled infants.

(a) Purpose. The regulations in this section implement certain provisions of the Act, including section 107(b)(10) governing the protection and care of disabled infants with life-threatening conditions.

(b) Definitions.

(1) The term "medical neglect" means the failure to provide adequate medical care in the context of the definitions of "child abuse and neglect" in section 113 of the Act and Sec. 1340.2(d) of this part. The term "medical neglect" includes, but is not limited to, the withholding of medically

indicated treatment from a disabled infant with a life-threatening condition.

(2) The term "withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's (or physicians') reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when, in the treating physician's (or physicians') reasonable medical judgment any of the following circumstances apply:

(i) The infant is chronically and irreversibly comatose;

(ii) The provision of such treatment would merely prolong dying, not be effective in ameliorating or correcting all of the infant's life-threatening conditions, or otherwise be futile in terms of the survival of the infant; or

(iii) The provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

(3) Following are definitions of terms used in paragraph (b)(2) of this section:

(i) The term "infant" means an infant less than one year of age. The reference to less than one year of age shall not be construed to imply that treatment should be changed or discontinued when an infant reaches one year of age, or to affect or limit any existing protections available under

State laws regarding medical neglect of children over one year of age. In addition to their applicability to infants less than one year of age, the standards set forth in paragraph (b)(2) of this section should be consulted thoroughly in the evaluation of any issue of medical neglect involving an infant older than one year of age who has been continuously hospitalized since birth, who was born extremely prematurely, or who has a long-term disability.

(ii) The term "reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

Wis. Stats. § 448.30 (2001).

> Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:
>
> (1) Information beyond what a reasonably well-qualified physician in a similar medical classification would know.
>
> (2) Detailed technical information that in all probability a patient would not understand.
>
> (3) Risks apparent or known to the patient.
>
> (4) Extremely remote possibilities that might falsely or detrimentally alarm the patient.

(5) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.

(6) Information in cases where the patient is incapable of consenting.

STATEMENT OF THE CASE

Just as the federal claim found in the Petition for Writ of Certiorari ("the Petition") was not presented to the Wisconsin Courts below, many of the facts and allegations found in the Petition were not presented to the same courts. This case was initially resolved on a Motion to Dismiss, pursuant to Wis. Stats. § 802.06(2)(a)6 (2000), before the Milwaukee County Circuit Court, and was based solely on the pleadings before the Court. For this reason the Petitioners' present claims were not considered by the Circuit Court, nor the Wisconsin Court of Appeals, District I, nor the Wisconsin Supreme Court. The only facts and allegations before the respective Wisconsin Courts were those in the Petitioners' Complaint. In addition to being raised at such a late date, many of the supposed facts in the Petition are misstatements.

The Respondents do not agree with the recitation of facts in the Petitioners' Complaint; the facts were accepted only for purposes of the Motion to Dismiss before the Milwaukee County Circuit Court. The basis for this lawsuit is the parents' allegations their son should not have been resuscitated at the time of his birth. The parents pled this as an informed consent case regarding the resuscitation. The parents did not sue any of the physicians involved in the care given to Emanuel Vila

("Emanuel") after he was resuscitated. The Wisconsin Court of Appeals decision underscored the well-settled principle that informed consent is solely within the realm of physicians, and further held the Petitioners abandoned the issue of dismissal of the claim against the hospital respondent. For this reason, Petitioners' allegations about the ability to discontinue medical care at a time after resuscitation must be disregarded.

In addition to the Petitioners' failure to raise issues in the Wisconsin courts below, they misstate some of the facts before the respective Wisconsin Courts. Respondents challenge the assertion Emanuel faced a more than ninety percent (90%) risk of developing a disability; no such facts were presented to the respective Wisconsin Courts in the Petitioners' Complaint. No allegations were presented to the respective Wisconsin Courts concerning the types of medical interventions used after Emanuel's birth, the reactions of the mother and putative father to the interventions, the information available to them, or comments of anyone at the hospital.

There was nothing presented to the respective Wisconsin Courts about the Petitioners' alleged trip to a library regarding information about prematurity, or about any supposed conversations with an unidentified bioethicist. Nothing in the complaint or in the facts before the respective Wisconsin Courts related to the supposed attempts to get treatment discontinued. The supposed request for a bioethics committee meeting was not before the respective Wisconsin Courts, nor were the allegations concerning the outcome and options now allegedly offered. There was nothing before the respective Wisconsin Courts about the claims of complications related to the newly-claimed treatments. In fact, such a causal relationship was

specifically denied by the Petitioners throughout the case in the Wisconsin Courts below.

All of the "facts" in Petitioners' Statement of the Case, after the first paragraph on page four (4) of the Petition and up to and including the first partial paragraph on page seven (7), are things not in the pleadings and not considered by the respective Wisconsin Courts. Further, many of the "facts" are bits and pieces of articles from medical journals not properly before any court in this case.

Although Petitioners claim the Wisconsin Courts based their decision on this Court's holding in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the decisions of the respective Wisconsin Courts in this case were actually based on public policy and a decision of the Wisconsin Supreme Court in *In re Edna M.F.*, 210 Wis. 2d 557, 563 N.W.2d 485 (1997)

REASONS FOR DENYING THE PETITION

There are many reasons why this is not a proper case for the exercise of certiorari. Three (3) of these reasons are discussed below. First, there was no federal question raised below. Second, the decision rests on independent and adequate state grounds. Third, the decision of the Wisconsin Court in this case is in accord with every decision of every state court that has been presented with a similar claim.

I. NO FEDERAL CLAIM WAS PRESENTED TO THE WISCONSIN COURTS

The questions presented in the Petition were never presented in the record or the decision below. Because the record is absent a showing that a federal claim was presented in the Wisconsin Court system, this Court is without jurisdiction under 28 U.S.C. § 1257 to decide this case and must therefore deny Petitioners' Petition for Writ of Certiorari.

This Court "has consistently refused to decide federal constitutional issues raised [at this Court] for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Moore v. Illinois*, 408 U.S. 786, 799 (1972); *Stanley v. Illinois*, 405 U.S. 645, 658 n. 10 (1972); *Hill v. California*, 401 U.S. 797 (1971). All federal claims must be either addressed by or properly presented to the state court that rendered the decision this Court has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *see also Heath v. Alabama*, 474 U.S. 82, 87 (1985); *McGoldrick v. Compagnie Genrale Transatlantique*, 309 U.S. 430, 434 (1940).

When the highest state court is silent on a federal question before this Court, this Court assumes the federal claim was not properly presented to the highest state court. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). *See also Street v. New York*, 392 U.S. 576, 582 (1969); *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945). Petitioners have the burden of defeating this assumption. *Board of Directors, supra*, 481 U.S. at 550. They must do so by showing the Wisconsin court had "a

fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb*, 451 U.S. 493, 501 (1981).

"[R]equiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record." *Adams*, 520 U.S. at 90, *quoting Webb*, 451 at 500. In *Webb*, this Court further discussed important policy considerations underlying this requirement. "These considerations strongly indicate that this Court should apply this general principle with sufficient rigor to make reasonably certain that this Court entertain from state courts only where the record clearly shows that the federal issue has been properly raised below." *Webb*, 451 U.S. at 499. Federal law based on these policy considerations requires that for this Court to invoke its jurisdiction in this matter, a federal claim must have been raised on the record in the Wisconsin courts. This case is, therefore, improper for review by this Court.

Rule 14.1(g) of the Rules of the Supreme Court of the United States requires, in part, that a Petition for Writ of Certiorari specify the manner and time of raising the federal questions sought to be reviewed to show the federal questions were timely and properly raised to the court of first instance and to the appellate courts. Petitioners' complete failure to comply with this requirement is tacit acknowledgment a federal question was not adequately raised in the respective Wisconsin Courts. Pursuant to Rule 14.4, the failure on Petitioners' part is sufficient reason alone for this Court to deny this petition.

II. THE STATE COURT DECISION RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The decision of the Wisconsin Court of Appeals rested on Wisconsin statues, Wisconsin case law and Wisconsin public policy. *See* 647 N.W.2d 413 (Ct. App. 2002). The Wisconsin Court of Appeals, basing its decision on independent and adequate state grounds, began by comprehensively setting forth the Wisconsin informed consent law, as contained within both common law and statutory provisions. *Id.* at 417-18.

The Wisconsin Court of Appeals made it clear the Wisconsin doctrine of informed consent, and the associated exercise of decision-making, only become applicable when there is a choice of viable medical alternatives. *Id.* at 418. The Court emphasized that, under Wisconsin law, petitioners had no right to deny medical treatment to Emanuel, therefore their premise, that they would have elected to withhold or withdraw treatment if given more information, was entirely faulty because *denying treatment was not a viable alternative. Id.* at 418-19. Citing *In re Edna M.F. supra*, 210 Wis. 2d at, 566-68, 563 N.W.2d 485 (1997), the Court reiterated, "withholding or withdrawing life-sustaining medical treatment is not in the best interests of any patient who is not in a persistent vegetative state." *Id.* at 49. Because Emanuel was not in a persistent vegetative state, the Court held that under Wisconsin law an alternative of withholding or withdrawing treatment *did not exist*. The Court went on to find *a separate reason* under federal statutory law, why no medical alternative existed; however, the Wisconsin grounds were clearly and expressly set forth as entirely adequate and dispositive when considered alone. *Id.*

The Wisconsin Court of Appeals also based its decision on Wisconsin public policy grounds, emphasizing Wisconsin's interest in preserving life is of "paramount significance," and a presumption exists under Wisconsin law that continued life is in the best interest of individuals. *Id.* at 420-21. *See L.W. v. L.E. Phillips Career Dev. Ctr.*, 167 Wis. 2d 53, 86, 90, 482 N.W.2d 60 (1992).

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Id.* at 125-126; *Ridgway v. Ridgway* 454 U.S. 46, 54 (1981).

This Court's jurisdiction is presumed to exist only if it is not clear the state court relied on independent and adequate state grounds, *and* when it fairly appears the state court rested its decision primarily on federal law. *Michigan v. Long*, 63 U.S. 1032, 1042 (1983). To the extent the Wisconsin Court of Appeals addressed federal statutory law in its decision, it merely represented an additional basis for a decision that was clearly dispositive on state grounds alone. By no means could the Wisconsin Court of Appeals' decision be categorized as resting primarily on federal law. The decision below was fully and independently supported by a combination of Wisconsin statutory provisions and decisional law and, therefore, this Court is without jurisdiction to consider this matter.

III. THE DECISION OF THE WISCONSIN COURT IS IN ACCORD WITH EVERY DECISION OF EVERY COURT TO RULE ON THE ISSUE

The Wisconsin decision is consistent with the decisions of the courts of two (2) other states that have faced claims similar to those being made here: New Jersey and Texas. Both courts were faced with cases involving parents and a child suing health care providers for keeping a premature baby alive without giving the parents the option of refusing treatment so the baby would die. The courts in New Jersey dealt with this issue in *Iafelice v. Zarafu*, 534 A.2d 417 (N.J. App. Div. 1987). The Law Division held the parents and child could not maintain their claims, as there was no legal alternative to resuscitation of the baby. The court summarized the case as follows:

> However ironic it may seem, plaintiffs point to the survival of their child as proof of damage. The gravamen of plaintiffs' complaint is that the doctrine of informed consent obligated [the physician] to inform them of the option of non-treatment. The parents expressed not only the intent that [the baby] be free from medical intervention, but that she be allowed to die.

Id. at 1042.

The trial court granted summary judgment dismissing the plaintiffs' claim. The Superior Court Law Division affirmed the dismissal, as did the Appellate Division.

The Law Division framed the issue as: "In discharging the duty of informed consent, is a physician negligent in failing to inform parents of a newborn infant manifesting a life-threatening condition . . . that they had the alternative of

non-treatment and letting the baby die?" *Id.* at 1041. The court held parents did not have that option.

The *Iafelice* decision was based on public policy grounds. The court stated the right of the child to live outweighed the right of the parents not to endure emotional and financial injury. The court cited *Berman v. Allen*, 404 A.2d 8 (1979), a wrongful life case in which the plaintiff's claim was dismissed, for the proposition life is to be cherished, regardless of whether it is experienced with or without a disability:

> One of the most deeply held beliefs of our society is that life – whether experienced with or without a major physical handicap – is more precious than non-life. *See In re Quinlan*, 70 N.J. 10, 19 & n.1 (1976). Concrete manifestations of this belief are not difficult to discover. The documents which set forth the principles upon which our society was founded are replete with references to the sanctity of life. * * * Nowhere in these documents is there to be found an indication that the lives of persons suffering from physical handicaps are to be less cherished than those of non-handicapped human beings.
>
> * * *
>
> We cannot, however, say that she would have been better off had she never been brought into the world . . . To rule otherwise would require us to disavow the basic assumption upon which our society is based. This we cannot do. [80 N.J. Super. at 429, 430.]

Iafelice, 501 A.2d at 1047.

The *Iafelice* court decided the issue as follows:

> This court determines that as of the time here relevant, November 1980 and in the circumstances presented, there was no legal duty which obliged the movants to inform the parents of an infant suffering from a life-threatening condition of an alternative to withhold treatment and to let the child die. It is only "the alternatives to that treatment, if any . . . " [citations omitted] that a physician must present and in the case at bar death was not a legally-sanctioned alternative.

Id. at 1049.

The Appellate Division, adopting the decision by the Law Division, further stated that:

> The mistaken premise of this appeal is that allowing the child to die untreated was a legally viable alternative . . . we find no support for the belief that a newborn child may be put to death through benign neglect on the mere expectation that she will, in some unquantified way, be a defective person. As the Supreme Court wrote in *Berman v. Allan*, 80 N.J. Super. 421, 430 (1979), "It is life itself that is jealously safeguarded, not life in a perfect state."

Iafelice, 534 A.2d at 418.

The Fourteenth Court of Appeals in Texas ruled in favor of a hospital in a similar case. *HCA, Inc., v. Miller*, 36 S.W.3d 187 (Tex. Ct. App. 2000) (appeal pending), also involved the birth of a premature baby. The baby was resuscitated over the parents' objections, and a wrongful life/wrongful birth lawsuit based on the doctrine of informed consent was filed against the corporation that owned the hospital. A jury awarded damages, however, the

verdict was reversed on appeal because the choice of non-treatment was not legally available to the parents. *Id.* at ¶20. The Fourteenth Court of Appeals acknowledged Texas' policy interest in guarding the well-being of minors, even where doing so requires limiting the freedom and authority of parents over their children. Recognizing Texas statutes allow a parent to discontinue medical care for a terminally ill child, the Texas Court of Appeals refused to extend that right to discontinue medical care for non-terminally ill children, stating "the state's interest in preserving life is greatest when life *can* be preserved and then weakens as the prognosis dims." *Id.* at ¶25. (Emphasis in original, citation omitted.)

Petitioners frame this case in terms of parents' rights to raise their children, yet they fail to acknowledge they have the right to raise their child. Nancy Montalvo and Brian Vila merely lack the right to ensure Emanuel's death because he may, someday, have a disability. What this case is truly about is the right of a child, born alive, to be resuscitated and evaluated before further treatment decisions are made. Here, Nancy Montalvo and Brian Vila allege a right to decide not to render care for Emanuel simply because he was at risk for developing a disability. Wisconsin law makes it clear that a third party may not choose death for a patient whose wishes are not known, and who is not in a persistent vegetative state. *In re Edna M.F., supra.*

CONCLUSION

This Court has no jurisdiction over this matter because no federal question was raised before the Wisconsin Courts and because the decision of the Wisconsin Courts rested on independent and adequate state grounds. Even if a federal question had been raised, the decision of the Wisconsin Courts is based on Wisconsin statutes, case law, and public policy, and is consistent with every other decision of every state court to rule on this issue.

For all of the foregoing reasons, Respondents Brent W. Arnold, M.D., Jonathan H. Berkoff, M.D., St Mary's Hospital of Milwaukee, the Wisconsin Patients Compensation Fund and Physicians Insurance Company of Wisconsin respectfully request this Honorable Court deny the Petition.

Respectfully submitted,

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